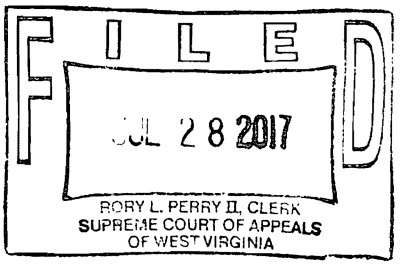
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston



ARTHUR L. CONKEY, JR. and
JO CAROL CONKEY,

Defendants Below/Petitioners

v. Docket No. 17-0141

SLEEPY CREEK FOREST OWNERS
ASSOCIATION, INC.,

Plaintiff Below/Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

NOW COMES Petitioners, Arthur L. Conkey, Jr. and Jo Carol Conkey, by counsel, Michael L. Scales, Esq., of Michael L. Scales, PLLC, and for the Petitioners' Reply Brief, respectfully say as follows:

III. ARGUMENT

A. The Court is required to construe the covenants and restrictions and consider them by employing plain language as to the phrase "by more than ten percent (10%) per year without the written vote of two-thirds (2/3) of the members" language in the covenants and restrictions.

It is axiomatic that the trial court should have employed plain meaning of terms restrictions to construe the language of the covenants and restrictions. In that regard, Respondent's assertion that Petitioners are "rewriting the language more to their liking to have it say that an assessment may not be raised by more than ten percent (10%) *from the assessment from the previous year*" (Respondent's Brief p. 3), is simply counter to Respondent's argument that changes the language of the covenants and restrictions to require some unspecified number of years as an average to determine whether or not the dues have been raised by ten percent (10%) per year. Under the Respondent's argument, how is one ever to determine how many years are to calculate the average whether an affirmative written vote of the members is required for the dues increase? The circuitous argument of the Respondent makes absolutely no sense that the analysis of the ten percent (10%) increase is something other than year over year.

The Circuit Court below was required to use plain and ordinary meaning of the language to determine the meaning of the terms, and not to create its own definition or that advanced by Respondent as to the average of the increases. See *Ramage v. South Penn Oil Co.,* 94 W.Va. 81, 118 S.E. 162, 168-169 (1923); and, *Bennett v. Dove,* 166 W.Va. 772, 277 S.E.2d 617 (1981), syl. pt. 3. It is clear that what was meant was that from the prior year, there cannot be an increase of

dues of more than ten percent (10%) for the following year without a written affirmative vote of two-thirds (2/3) of the members which written affirmative votes were never taken. Furthermore, Respondent suggests that the lower court did not have the minutes of any meetings or minutes to show when the dues were increased. However, there was in fact evidence to show there were at least three increases of dues that were more than ten percent (10%) from the prior year (years 2002-2003; 2005-2006; and, 2015-2016). (App. 71-72). Even if the minutes had been available, those minutes would not show any ***written, affirmative votes of the members***. And how would minutes by the directors reflect any different procedure in members' voting from an increase of five percent (5%) from the previous year – except by the minutes?

It is clear that the Board of Directors of the Respondent never obtained any written affirmative approval from the members, and thus the three years in question render all subsequent years of dues collections void *ab initio*, at least beginning in the year 2002-2003.

Once again, Respondent takes exception to Petitioners' analysis that there has never been a written affirmative vote of the members. (Respondent's Brief p. 6). However, nowhere within the Respondent's Response Brief or the record below is there any statement or representation by Respondent that there has ever been any written affirmative vote of the members. In fact, the Respondent relies solely upon minutes that were generated by the Board of Directors themselves, and not any written record of the members which is required by the covenants and restrictions. It is clear that the "super majority" required by the covenants and restrictions to raise dues more than ten percent (10%) per year requires a keeping of written votes from the members themselves, and not some minutes generated by the Board of Directors which is the body that proposes the increased dues to a much higher level than permitted without the written affirmative member votes. Once again, the Respondent fails to acknowledge the plain meaning of the terms

of the covenants and restrictions that in order to increase the dues by more than ten percent (10%) requires the Board of Directors to actually solicit and obtain **written** votes of the members showing their affirmation of the increase in excess of ten percent (10%) from the prior year. Obviously, this was intended to control the actions of the Board of Directors so that the members were not to be charged with excessively high dues increases without having some **affirmative** response by them in writing which is required by the covenants and restrictions.

If the Board of Directors were free to write the minutes to show that there were written affirmative votes for more than ten percent (10%) of the members, what control would the members have over the Board of Directors? It seems clear that the covenant provision was intended to assure some element of control over the Board by the members for excessive increases of dues by requiring the super majority of two-thirds and a written record of the members for an increase of more than ten percent (10%) which were never acquired by the Board of Directors.

While the Respondent grants lip service to the meaning of the word "writing" in the Respondent's Brief p. 7, Respondent does not understand that it was meant that the members must write that they agreed to such an increase, not the Board of Directors who is attempting to increase the percentage of dues beyond what they are entitled to do without that written vote.

It is obvious that the Circuit Court did not construe the covenants and restrictions by their plain meaning, and did not decide that the Respondent's Board of Directors was required to obtain the members written two-thirds vote for increases in dues in excess of ten percent (10%) per year. For that reason alone, the Respondent may not prevail in any of its claims against Petitioners.

B. The collection efforts of the Respondent undoubtedly violate the West Virginia Consumer Credit and Protection Act ("WVCCPA") because the assessments that they have made are not authorized by express contractual authority under the covenants and restrictions.

Without belaboring the point, because there were no written affirmative votes of the members for increases of dues in excess of ten percent (10%) per year, there is no express contractual authority for assessing the dues which commenced at least from the 2002-2003 fiscal year, by the Respondent officer's own affidavit. (Appt. 71-72). Any assessments after the 2002-2003 fiscal year were not authorized because they exceeded the ten percent (10%) from the prior year in violation of the covenants and restrictions.

While Respondent continues to cite for authority *Fleet v. Webber Springs Owner's Association, Inc.,* 235 W.Va. 184, 772 S.E.2d 369 (2015), apparently Respondent does not challenge the fact that the assessments made by the Respondent for homeowner's association dues in this civil action predated the effective date of June 8, 2016 for the statutory changes to §46A-1-105(a)(3) of the W.Va. *Code*, and that the instant civil actions were filed on or about April 8, 2016 [App. 3][1].

The debt collection provisions of WVCCPA, in particular W.Va. *Code* §46A-2-128(d), defining unfair and unconscionable conduct, require that ***both*** the attempt to collection any charge, fee, etc. must be expressly authorized by the agreement creating or modifying the obligation **and** by a statute of regulation. As previously stated, the dues and assessments that were in excess of ten percent (10%) from the prior year beginning in fiscal year 2002-2003, renders all the dues assessed from that year forward to be invalid and without force and effect, and therefore in violation of the covenants and restrictions.

[1] The dues and assessments for which Petitioners are being charged are for the fiscal years 2014-2015 and 2015-2016. These assessments were made on or about August 1, 2014, and August 1, 2015, for fiscal years beginning November 1, 2014 and November 1, 2015, respectively. [App. 71, ¶13]. These assessments also predate the effective date of June 8, 2016, of the amendment to §46A-1-105(a)(3) of the W.Va. *Code*.

C. The Respondent is not entitled by statute to impose attorneys fees upon the Petitioners for the alleged dues and assessments.

As expected, Respondent relies upon §36B-3-116(f) of the W.Va. *Code* and the decision of this Honorable Court in *United Bank, Inc. v. Stonegate,* 220 W.Va. 375, 647 S.E.2d 811 (2007), that attorneys fees are awardable to the Respondent from Petitioners in this civil action even though it was prosecuted and filed by Respondent as a mere contract claim on an open account, and not a suit to enforce a lien as is required by §36B-3-116 of the W.Va. *Code*, styled "Lien for Assessments".

It is noteworthy that the Respondent never addressed in its Brief the argument made by the Petitioner in Petitioner's Opening Brief (pp. 15-16) that §36B-3-116(e) of the W.Va. *Code* which creates an exception to the attorneys fees being awarded, when it states as follows:

> (e) This section ***does not prohibit actions to recover sums for which subsection (a) created a lien*** or prohibit an association from taking a deed in lieu of foreclosure. [Emphasis added].

It is also clear from prior cases of this Honorable High Court that this Honorable High Court must give meaning to all portions of the statute, and not disregard them, when interpreting the statute, and must construe §36B-3-116(e) of the W.Va. *Code* as having some meaning. *Osborne v. United States,* 211 W.Va. 667, 567 S.E.2d 677 (2002), syl. pts. 3 and 4; *State v. Carper,* 176 W.Va. 309, 312, 342 S.E.2d 277, 280 (1986); and, *West Virginia Educ. Ass'n v. Preston County Bd. of Educ.,* 171 W.Va. 38, 41, 297 S.E.2d 444, 447 (1982). Additionally, §36B-3-116(f) of the W.Va. *Code* limits the award of attorneys to "any action brought under this section" [*ie.,* to actions brought to enforce the lien for dues and assessments against the lots being assessed, and not for actions excluded under §36B-3-116(e), being "actions to recover sums for which subsection (a) creates a lien", like the case *sub judice*].

Hence, Respondent has never responded to Petitioners' argument that the type of case that was brought by the Respondent against Petitioners in the Magistrate Court and removed to Circuit Court to merely attempt to obtain a judgment for the allegedly delinquent dues and assessments, without seeking to enforce the lien against the Petitioners' real estate four lots, is **NOT** one in which attorneys fees are awardable because it is excluded from §36B-3-116 as an "action[] to recover sums for which subsection (a) creates a lien" under §36B-3-116(e) of the W.Va. *Code*. This argument asks this Honorable High Court to modify its decision in *United Bank, Inc. v. Stonegate, supra.*, to award attorneys fees ONLY in cases where homeowners associations are seeking to enforce liens for dues and assessments, and not in cases of mere collection of dues and assessments as stated in §36B-3-116(e), being the exception.

Finally, the Petitioners, for the first time (Respondent's Brief, pg. 12), seek to have the Court consider that the award of attorneys fees is based upon §36B-4-117 of the W.Va. *Code*. This is not the statute under which the Circuit Court awarded the Respondent attorneys fees against Petitioners [App. 194-195] below, and this argument is first raised on appeal, and it is a non-jurisdictional issue. Therefore, this Honorable Court may not consider a non-jurisdictional issue first raised on appeal pursuant to the decisions of this Honorable Court in *Shaffer v. Acme Limestone Co., Inc.,* 206 W.Va. 333, 349, 524 S.E.2d 688, 704, n. 20 (1999); *Noble v. West Virginia Dept. of Motor Vehicles,* 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009); and, *Hoover v. West Virginia Bd. of Medicine,* 216 W.Va. 23, 26, 602 S.E.2d 466, 469 (2004).

For the foregoing reasons, under no circumstances may the Respondent collect attorneys fees in a case in which Respondent solely requested in its Complaint a judgment on a mere breach of contract claim, and did not assert a claim to have the Petitioners' real estate sold to enforce Respondent's lien for dues and assessments as required by §36B-3-116 of the W.Va.

Code, and this Honorable High Court should modify its decision in *United Bank, Inc. v. Stonegate, supra.*, to reflect the proper construction of §36B-3-116(e) of the W.Va. *Code*.

D. Petitioners are not liable for interest at ten percent (10%) as that amount is undoubtedly usurious under W.Va. *Code* §47-6-5(b).

Petitioners indeed rely on §47-6-5(b) of the W.Va. *Code* for their claim that ten percent (10%) interest on their allegedly delinquent 2014-2015 assessments is unenforceable and usurious.

It is clear that loans and other forbearances of money are restricted to eight percent (8%) under §47-6-5(b) of the W.Va. *Code*.

Apparently, Respondent concedes that §36B-3-115(b) of the W.Va. *Code* is one of those statutes which does not apply to pre-existing homeowner's associations such as Respondent under §36B-1-204 of the W.Va. *Code*, but rely upon the **general** provisions under §36B-1-206 of the W.Va. *Code*, which provides as follows:

> (a) In the case of amendments to the declaration, by-laws or plats and plans of any common interest community created before the effective date of this chapter: ...
>
> (2) If the result accomplished by the amendment is permitted by this chapter, and was not permitted by law prior to this chapter, the amendment may be made under this chapter.
>
> (b) An amendment to the declaration, by-laws or plats and plans authorized by this section to be made under this chapter must be adopted in conformity with applicable law and with the procedures and requirements specified by those instruments. If an amendment grants to any person rights, powers or privileges permitted by this chapter, all correlative obligations, liabilities and restrictions in this chapter also apply to that person.

The Respondent suggests that this general passage in §36B-1-206 permits the Respondent to collect ten percent (10%) interest even though it violates the specific provisions of §47-6-5(b) of the W.Va. *Code*.

Because §36B-1-206 is a general provision and the provisions of §47-6-5 of the W.Va. *Code* are specific provisions ["Except in cases where it is otherwise specifically provided by law...[2]], the specific provisions of §47-6-5 of the *Code* override §36B-1-206 of the W.Va. *Code,* as being a general provision.

This Honorable Court has stated on repeated occasions that where two statutes come to an irreconcilable conflict, the specific statute applies over the general statute. *Cf., State ex rel. Tucker County Solid Waste Authority v. WV Div. of Labor,* 222 W.Va. 588, 668 S.E.2d 217 (2008), syl. pt. 6; *Harrison County Com'n v. Harrison County Assessor,* 222 W.Va. 25, 31, 658 S.E.2d 555, 561 (2008); *Bowers v. Wurzburg,* 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999); *Newark Ins. Co. v. Brown,* 218 W.Va. 346, 624 S.E.2d 783 (2005), syl. pt. 3; *UMWA by Trumka v. Kingdon,* 174 W.Va. 330, 325 S.E.2d 120 (1984), syl. pt. 1; *Robinson v. Bluefield,* 234 W.Va. 209, 214, 764 S.E.2d 740, 745 (2014); *Zimmerer v. Romano,* 223 W.Va. 769, 679 S.E.2d 601 (2009), syl. pt. 14; and, *Carvey v. West Virginia State Bd. of Educ.,* 206 W.Va. 720, 527 S.E.2d 831 (1999), syl. pt. 6.

Because the specific provision prohibits the interest, the general provision under §36B-1-206 of the W.Va. *Code* cannot resurrect it. The charging of ten percent (10%) interest on delinquent dues and assessments violates the eight percent (8%) limitation under §47-6-5(b).

Respondent's arguments about the judgment interest under §56-6-31 of the W.Va. *Code* at ten percent (10%) are irrelevant to the issue *sub judice*. The instant case does not involve interest on judgment or pre-judgment interest where there is a specified amount of interest stated in the instrument itself, being the covenants and restrictions, which provide for an amount of ten percent (10%) interest, which in this case is usurious.

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[2] §36B-1-206(a)(2) of the W.Va. *Code* does NOT specifically provide otherwise. It is a general, catch-all provision.

For the foregoing reasons, Petitioners cannot be charged ten percent (10%) interest on any allegedly delinquent dues and assessments, and that claim against Petitioners must fail.

IV. CONCLUSION

In a weak attempt to seek pity from this Honorable Court, Respondent requests this Honorable Court, as a policy decision, to rely upon Judge Loughry's concurring opinion in *Fleet v. Webber Springs, supra.,* 235 W.Va. at 195-196, 772 S.E.2d at 380-381, about the plight of homeowners associations. The Legislature heeded Justice Loughry's call and enacted §46A-1-105(a)(3) of the W.Va. *Code*, but that amendment may only apply for claims arising after the effective date of the amendment, June 8, 2016. The instant claims arose and were filed before the effective date; therefore, §46A-1-105(a)(3) does not apply.

However, this Honorable Court cannot ignore the law as it stood at the time in which these wrongful and illegal assessments were made against the Petitioners as violations of WVCCPA debt collection practice provisions. While the law may have changed under WVCCPA subsequent to the time of Respondent's illegal and erroneous assessments, nothing has changed the law prior to that time, and nothing may.

The actions taken by the Respondent in attempting to collect dues and assessments that were not properly assessed at least from 2002-2003 fiscal year do not change the result which must take place. This Honorable Court must reverse the Final Order of the Circuit Court of Morgan County, West Virginia entered on February 11, 2017, and remand this case to that Circuit Court with the following instructions:

a. To reverse the Order Granting Summary Judgment to the Respondent in its entirety;

b. To deny Respondent's Motion for Summary Judgment;

c. Reverse the Order of the Circuit Court of Morgan County, West Virginia Denying Petitioners' Motion for Partial Summary Judgment as to Liability Against Respondent Under WVCCPA;

d. Grant Petitioners' said Motion for Partial Summary Judgment as to Liability; and,

e. Instruct the Circuit Court of Morgan County, West Virginia upon remand, to order denied Respondent's claims for allegedly delinquent dues and assessments from Petitioners and the related claims for interest and attorneys fees, and to determine the amount of Petitioners' damages and Petitioners' attorneys fees and costs under WVCCPA.

Respectfully submitted this 27th day of July, 2017.

Arthur L. Conkey, Jr. and Jo Carol Conkey,
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By Counsel

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Plaintiff Below/Respondent.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Petitioners, Arthur L. Conkey, Jr. and Jo Carol Conkey, Defendants Below, do hereby certify that I have served a true copy of the foregoing PETITIONERS' REPLY BRIEF upon Plaintiff Below/Respondent, by mailing a true copy thereof to counsel for Plaintiff Below/Respondent, Charles S. Trump, IV, Esq., to his address of 171 S. Washington Street, Berkeley Springs, WV 25411, this 27th day of July, 2017.

Michael L. Scales, Attorney at Law